

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. **D.C.**

DATE: January 29, 1990
CASE NO. **86-JTP-10**

IN THE MATTER OF

MOTIVATION, EDUCATION, AND
TRAINING, INC.,

COMPLAINANT,

v.

U.S. DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1781 (**1982**), and the regulations promulgated under 20 C.F.R. Parts 626, 633, 636 and 29 C.F.R. Part 18 (1988). On June 23, 1989, Administrative Law Judge (**ALJ**) Alexander Karst granted the Grant Officer's motion for Summary Decision affirming the Grant Officer's disallowance of costs claimed by Motivation, Education, and Training, Inc. (MET), pursuant to its JTPA grant. ^{1/} On July 11, 1989, MET requested that the Secretary review the **ALJ's** order, and on

^{1/} In the Matter of Motivation, Education, and Training, Inc. v. U.S. Department of Labor, Case No. 86-JTP-10, Summary Decision and Order (S.D. and O.).

July 25, 1989, the Grant Officer, by letter, stated that the legal issues involved in this case were such that further review by the Secretary would be appropriate. ^{2/} On August 3, 1989, the Secretary asserted jurisdiction in this case, reminding the parties of the 180 day timeframe within which the Secretary's decision is to be issued. ^{3/}

On August 16, 1989, the parties jointly requested an extension of time within which to file their briefs ^{4/} and on August 30, 1989, the Secretary issued an order revising the briefing schedule and providing dates certain for the submission of the parties' briefs. MET was to file its initial brief on or before September 29, 1989; the Grant Officer was to file his response brief on or before October 27, 1989; and MET was to file its reply brief on or before November 13, 1989. ^{5/} MET timely made its initial filing, stating that it would rely on the

^{2/} Letter to Honorable Elizabeth Dole from Harry Sheinfeld, Counsel for Litigation, dated July 25, 1989.

^{3/} In the Matter of Motivation, Education, and Trainina, Inc. v. U.S. Department of Labor, 86-JTP-10, Secretary's Order Asserting Jurisdiction and Establishing a Briefing Schedule, at 2.

^{4/} In the Matter of Motivation, Education, and Training, Inc. v. U.S. Department of Labor, 86-JTP-10, Request for Extension of Time, dated August 16, 1989.

^{5/} In the Matter of Motivation, Education, and Trainins, Inc. v. U.S. Department of Labor, 86-JTP-10, Order Revising Briefing Schedule, issued August 30, 1989, at 1.

arguments incorporated into its July 11th request for review. ^{6/} The Grant Officer did not file a response brief, but on November 8, 1989, twelve days after the due date for the response brief, filed a motion to remand this case "to the Administrative Law Judge for further proceedings concerning the allowability of the costs questioned in the Final Determination." ^{7/} On November 20, 1989, the Secretary issued an order directing the **Grant** Officer to submit to the Office of Administrative Appeals the briefs before the United States Court of Appeals for the Tenth Circuit in In the Matter of ORO Development Corporation v. U.S. Department of Labor, Case No. 86-JTP-6, cited by Grant Officer in his remand motion, ^{8/} anneal docketed, No. 88-1363 (Mar. 12, 1989). On November 20, 1989, MET filed a reply opposing the Grant Officer's motion to remand this case to the **ALJ** and requesting that the **ALJ's** decision be reversed on equitable grounds. ^{9/}

^{6/} In the Matter of Motivation, Education, and Trainins, Inc. v. U.S. Department of Labor, 86-JTP-10, Complainant's Initial Brief, dated September 27, 1989.

^{7/} In the Matter of Motivation, Education, and Training, Inc. v. U.S. Department of Labor, 86-JTP-10, Motion to Remand, dated November 8, 1989, at 1.

^{8/} In the Matter of Motivation, Education, and Trainina. Inc. v. U.S. Department of Labor, 86-JTP-10, Secretary's Order, dated November 20, 1989.

^{9/} In the Matter of Motivation. Education, and Trainins. Inc. v. U.S. Department of Labor, 86-JTP-10, Complainant's Reply Brief & Opposition to Motion to Remand, dated November 20, 1989.

DISCUSSION

The case before me has one issue at dispute: the allowability of costs incurred on behalf of prior grants being charged to subsequent grants. The challenged costs were incurred for legal services in support of MET's contesting the Grant Officer's disallowance of certain costs under **MET's** prior Comprehensive Employment and Training Act (CETA) ^{10/} grants. These costs were incurred by MET during the administration of its CETA grants from October 1979, through September 1981. ^{11/} Here the Grant Officer disallowed the costs for legal services incurred in contesting disallowed CETA expenditures by MET during the period from October 1, 1983, through March, 1985. The stated reason for that disallowance was that the costs were incurred in support of the prosecution of claims against the government and thus contrary to Office of Management and Budget (OMB) Circular A-122 Attachment B, 34(d). ^{12/} MET charged these costs for legal services, in the amount of \$6,518, to its then current JTPA grants. MET appealed the Grant Officer's disallowance to the Office of Administrative Law Judges and the case was docketed on October 1, 1986.

On February 18, 1988, the Secretary issued a final decision and order in In the Matter of ORO Development Corporation v. U.S.

^{10/} 29 U.S.C. §§ 801-999 (Supp. V. 1981).

^{11/} Hearing Transcript (TR.) at 10.

^{12/} Grant Officer's Final Determination, dated March 17, 1986, Administrative File at 9, 11.

Department of Labor, Case No. 86-JTP-6, which determined that grantees were prohibited from charging costs incurred on behalf of prior, terminated grants to other, current grants. Slip op. at 7-12. Based on the Secretary's ORO decision, the Grant Officer moved for summary decision in this case. A hearing was held on April 27, 1988, wherein the sole issue was the Grant Officer's motion for summary decision. ^{13/}

The **ALJ** granted the motion of the Grant Officer for summary judgment which was based solely on the Secretary's final decision and order in the ORO case. S.D. and O. at 3. My review of the documents before me in this case, as well as the briefs of the parties before the appeals court in ORO, does not persuade me that the prohibition against charging costs incurred in one grant to the funds of another grant is in error. The cost principles embodied in the regulations governing JTPA grantees at 20 C.F.R. § 633.303, ^{14/} appear unambiguous as to their meaning and intent

^{13/} TR. at 4-7.

^{14/} Section 633.303 is entitled "[a]llowable costs," and provides in pertinent part: "(b) Unless otherwise indicated below, direct and indirect costs shall be charged in accordance with 41 CFR Part 29-70 and OMB Circular A-122."

The regulations in 41 C.F.R. Part 29-70 were last published in C.F.R. in 1984. They have been superseded but remain applicable to all contracts (such as those in issue here) that preceded the April 1, 1984, effective date of the successor provisions. 41 C.F.R., Editorial Note at 4 (1987).

The regulation for cost principles set out in 41 C.F.R. § 29-70.103 (1984) provides in relevant part:

In determining allowable costs under a grant or agreement, the DOL agency shall use Federal cost principles referenced in this section which are

and I believe they were properly applied in the final decision and order in ORO.

The Grant Officer's Motion to Remand states that "[f]urther

applicable to the recipient's organization; shall ensure that each recipient receives a copy of applicable cost principles; and shall allow only those costs permitted under the cost principles which are reasonable, allocable, necessary to achieve approved program goals, and which are in accordance with DOL agency policy and terms of the grant or agreement. The following cost principles apply:

* * * *

(c) Other nonprofit organizations. OMB Circular A-122 entitled, "Cost principles for nonprofit organizations," provides principles for determining costs applicable to grants and agreements with nonprofit organizations.

OMB Circular A-122, Attachment A, ¶ 4, entitled, "allocable costs," provides:

a. A cost is allocable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relevant benefits received. A cost is allocable to a Government award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

(1) Is incurred specifically for the award.

(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received.

(3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

b. Any cost allocable to a particular award or other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

consideration of the Secretary's decision in ORO has led the Grant Officer to conclude that this particular restriction on the use of grant funds in the cost disallowance process may create administrative burdens on the grantees that are not warranted and not required by the **regulations.**" Motion at 2 (emphasis added). But the Grant Officer offers no legal analysis or rationale to support an alternative interpretation of the regulations, OMB Circular A-122 which is incorporated into the regulations, or the statute. See n.14, supra. The fact that promulgated regulations may result in administrative burdens for some recipients of federal grants may present a basis for review and possibly revision of those regulations. But such a circumstance does not present a basis to ignore the regulations.

An agency must honor its own regulations unless and until it has rescinded or amended these regulations after rulemaking proceedings. See In the Matter of Office of Federal Contract Compliance Programs, U.S. Department of Labor v. Western Electric Company, Case No. 80-OFCCP-29, Deputy Under Secretary's Remand Decision and Order, issued April 24, 1985, **slip op.** at 14 and cases cited. An adjudication proceeding is not the proper forum to modify duly promulgated regulations. **Id.**

In its reply brief and opposition to the Grant Officer's motion to remand, MET cites 29 U.S.C. § 1574(e)(1), as a basis for the Secretary to exercise her discretion to reverse the **ALJ's** decision. The language of that section does not authorize the Secretary to waive recoupment of misexpended grant funds; rather

it requires that if the Secretary determines that misexpenditure was due to willful disregard of the Act's requirements, gross negligence or the failure to observe accepted standards of administration, that the grantee **"shall be liable"** to repay such amounts from other than JTPA grant funds. ^{15/}

The legislative history pertinent to this section of JTPA illustrates Congress' concern that the Department of Labor had "unacceptably **weak**" internal controls in the predecessor CETA program and intended that the JTPA legislation provide guidance to strengthen the monitoring and financial accountability of JTPA grantees. ^{16/} MET's apparent contention that the Secretary derives waiver authority as a corollary to situations where willful disregard of the Act's requirements, gross negligence **or**

^{15/} Section 1574 is entitled "[f]iscal controls: sanctions" and states in pertinent part:

(e) Conditions for recipient's liability; conditions for recipient's liability for subgrantee noncompliance; Secretary's discretion

(1) Each recipient shall be liable to repay such amounts, from funds other than funds received under this chapter, upon **a** determination that the misexpenditure of funds was due to willful disregard of the requirements of this chapter, gross negligence, or failure to observe accepted standards of administration. No such finding shall be made except after notice and opportunity for a fair hearing.

(1982)


^{16/} S. Rep. No. 97-469, 97th Cong., 2 Sess., 26, reprinted in 1982 U.S. Code Cong. & Admin. News 2661. See House Conf. Rep. No. 97-889, 97th Cong., 2 Sess. 119, 120, reprinted in 1982 U.S. code Cong. & Admin. News 2741, 2742.

the failure to observe accepted standards of administration may be absent, is not persuasive.

ORDER

Upon consideration of the record and the parties' submissions, the Grant Officer's motion to remand this case to the **ALJ IS DENIED**. **MET's** request that the Secretary reverse the **ALJ's** decision granting summary judgment IS DENIED. I find that the ALJ properly applied the Secretary's decision in **ORO**. Accordingly, the **ALJ's** June 23, 1989, decision granting summary judgment IS AFFIRMED. Motivation, Education, and Training, Inc. shall pay the U.S. Department of Labor, from nonfederal funds, the sum of \$6,518.

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Motivation, Education, and
Training, Inc. v. U.S. Department of Labor

Case No. : 86-JTP-10

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following
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